FOR ARGUMENT

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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLOSING BRIEF FOR PETITIONER

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I.

EXTENDING THE "PLAIN STATEMENT" RULE TO A STATE SUPREME COURT'S DECISION NOT TO DECIDE UNDULY BURDENS STATE PROCEDURE.

Respondent insists that extension of the "plain statement" rule to summary denials of habeas corpus petitions will impose "no unmanageable burden on the California Supreme Court" because "[t]his rule has been applied consistently in the Ninth Circuit with the approval of the state. *See, e.g., McQuown* v. *McCartney*, 795 F.2d

807 (9th Cir. 1986); *LaRue* v. *McCarthy*, 833 F.2d 140 (9th Cir. 1987); *Kim* v. *Villalobos*, 799 F.2d 1317 (9th Cir. 1986)." (Resp. Br. at 5, 7.) According to respondent, since *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), "[b]oth the California Supreme Court and the Ninth Circuit have recognized, without objection by the state attorney general, that a minute order [summary] denial of state habeas relief will be treated as a determination on the merits." (Resp. Br. at 4.) As we shall show, none of these decisions held that a state court had waived a petitioner's procedural default. In fact, the state has accepted a Ninth Circuit *exhaustion* rule, not the federal court's characterization of state supreme court practice, nor its conclusion that our high court regularly waives procedural defaults.

In 1974, the Ninth Circuit reviewed state habeas corpus procedure in California. In *Harris* v. *Superior Court*, *supra*, the federal appellate court confronted the question whether a federal habeas petitioner had exhausted all available state remedies when the California Supreme Court denied his state habeas application without explanation. If the state court's silence were understood to imply that the petition was procedurally defective, the state prisoner might be placed in a legal limbo, unable to obtain a ruling on the merits from the highest state court despite repetitive petitions, yet unable to cross the exhaustion threshold of the federal district court. That outcome advanced no legitimate interest of the state or the petitioner. In that context, the Ninth Circuit announced its "postcard denial" rule:

> "[W]hen the California Supreme Court denies a habeas corpus petition without opinion or citation, or otherwise decides on the merits of the petition, the exhaustion requirement is satisfied." 500 F.2d at 1128-1129.

Harris v. *Superior Court* might have been explained on the ground that the purpose of the exhaustion doctrine, minimizing federal-state friction "by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981), was fulfilled by a habeas petition which afforded the highest state court an *opportunity* to entertain the applicant's claims, albeit in a procedurally imperfect context. Cf. *Turner* v. *Compoy*, 827 F.2d 526 (9th Cir. 1987), *cert. denied*, 489 U.S. 1059 (1989); *Thompson* v. *Wainwright*, 714 F.2d 1495, 1505 (11th Cir. 1983). Unfortunately, the Ninth Circuit instead chose to characterize the state court's post-1969 summary denials as rulings on the merits, a characterization given effect as a presumption. However, neither the Ninth Circuit nor the state could have foreseen any procedural default implications in *Harris*, for it was decided three years before *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). See also *Thompson* v. *Procunier*, 539 F.2d 27, 28 (9th Cir. 1976).

In another exhaustion case, *McQuown* v. *McCartney*, *supra*, 795 F.2d 807, the Ninth Circuit declined to extend the presumption created in *Harris* v. *Superior Court* to petitions for hearing in the California Supreme Court following the denial of habeas relief by the intermediate state appellate court. While the Ninth Circuit treated our supreme court's original habeas corpus jurisdiction as

mandatory in *Harris*, *McQuown* acknowledged that the state high court exercised discretionary appellate jurisdiction in habeas cases. Procedural default was not discussed in *McQuown*. Of course, it is inconceivable that by denying a review petition that failed to satisfy the federal habeas exhaustion requirement, the California Supreme Court could be held to have waived any procedural default. *McQuown's* present significance arises from the Ninth Circuit's intimation that *Harris* v. *Reed*, 489 U.S. 255 (1989), expands federal habeas jurisdiction by erasing the distinction drawn in *McQuown*. *Nunnemaker* v. *Ylst*, 904 F.2d 473, 476 n.4 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3344 (1990).

Kim v. *Villalobos*, *supra*, 799 F.2d 1317, is an exhaustion case, too. The district court dismissed Kim's federal habeas petition for failure to exhaust available state remedies after the California Supreme Court had denied his state habeas petition, citing *In re Swain*, 34 Cal.2d 300, 209 P.2d 793 (1949). *Swain* holds that because "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," a denial for this reason "is not a ruling on the merits." 34 Cal.2d at 303-304, 209 P.2d 793. *Harris* v. *Superior Court* declared that a citation to *Swain* reflected a denial on procedural grounds. 500 F.2d at 1128. However, twelve years later, in *Villalobos*, the Ninth Circuit rejected the state's claim that "citation of *Swain* establishes *per se* that Kim has failed to exhaust." 799 F.2d at 1319. *Villalobos* explained that if a state petitioner alleges his federal claims as specifically as possible, a denial on the basis of *Swain* is not on the procedural ground of insufficient particulars, but in effect constitutes a rejection on the merits, thereby

exhausting the underlying claim. *Id*. at 1319-1320. Since the petitioner, but not the state court, knows whether additional facts can be supplied, the California Supreme Court knows that it denied the petition, but only the petitioner knows why. *Kim* v. *Villalobos* addressed only the question whether the petitioner had satisfied the exhaustion requirement; the court did not discuss the procedural default doctrine, much less hold that any state court had waived any procedural default.

LaRue v. *McCarthy*, *supra*, 833 F.2d 140, is neither an exhaustion case nor a procedural default case. On federal habeas corpus, LaRue claimed that "the California Supreme Court had denied him equal protection by rejecting his petition for a writ of habeas corpus, and thereby refusing to apply retroactively a recent [state] supreme court case." *Myers* v. *Ylst*, 897 F.2d 417, 427 n.1 (9th. Cir.) (Kozinski, J., diss.), *cert. denied,* 111 S.Ct. 212 (1990). The Ninth Circuit noted that "LaRue has not cited any instance in which California has applied [its recent decision] retroactively," adding that prospectivity "might be unfair, but it is not unconstitutional." *LaRue* v. *McCarthy*, *supra*, 833 F.2d at 142. The Ninth Circuit then further, and unnecessarily, held that the California Supreme Court's silent denial of LaRue's habeas petition constituted a ruling on the merits, *i.e.*, the state high court had decided not to apply its new rule retroactively to any petitioner. *Id*. The federal appeals court reached this conclusion although LaRue pointed out that decisions of the California Supreme Court must "be in writing with reasons stated" (see Cal. Const., art. VI, § 14), and cited state decisional law refusing res judicata effect to summary denials of habeas corpus petitions. 833 F.2d at 143 n.2.

Contrary state law notwithstanding, the Ninth Circuit withheld habeas relief from LaRue by invoking the presumption created in *Harris* v. *Superior Court* to afford state prisoners access to a federal forum.

Respondent's authorities do not reflect two decades of state acquiescence in the Ninth Circuit's mischaracterization of California Supreme Court decisions not to decide claims raised in state habeas corpus petitions as decisions on the merits. What the state *has* accepted is the exhaustion rule adopted in *Harris* v. *Superior Court*. While some Ninth Circuit cases "unfortunately, have perpetuated the confusion between 'waiver' and 'exhaustion,'" California Continuing Education of the Bar, *Appeals and Writs in Criminal Cases* (December 1988 Supp.), p. 145, our vital interests in enforcing state procedural rules require California to resist such confusion and, for procedural default purposes, to reject the rationale of *Harris* v. *Superior Court*. "The exhaustion requirement . . . serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth* v. *Serrano*, *supra*, 454 U.S. at 3. However, "[t]he interest in encouraging state court cooperation in the process of vindicating federal constitutional rights is a distinctly federal one," Note, 97 Harv. L. Rev. 511, 523 (1983), for to the extent that state courts implement federal rights, the exhaustion requirement relieves federal court dockets and reduces federal habeas reversals of state court convictions, thereby minimizing state hostility towards federal courts. In contrast, the procedural default rule vindicates a state's vital interests in the integrity of its

trial and appellate procedures and in the finality of its judgments. *See Wainwright* v. *Sykes, supra*, 433 U.S. at 88-89; *Klein* v. *Harris*, 667 F.2d 274, 285 (2d Cir. 1981). It is no accident that federal courts which reject a state's affirmative waiver of the exhaustion requirement, *see, e.g., Batchelor* v. *Cupp*, 693 F.2d 859 (9th Cir. 1982) (disapproving Oregon Attorney General's routine concession of exhaustion of claims never presented to highest state court), will hold procedural defaults waived by a state's failure to claim them at the earliest opportunity. *See, e.g., Hughes* v. *Idaho State Board of Corrections*, 800 F.2d 905, 906 n.1 (9th Cir. 1986); *Batchelor* v. *Cupp*, *supra*, 693 F.2d at 863-864. Instead, such decisions show where true federal and state interests lie.

Respondent's account of the interaction between Ninth Circuit and California Supreme Court habeas corpus practices is incomplete. Perhaps the first Ninth Circuit opinion to transform our state high court's refusal to entertain a habeas petition into a forfeiture of a procedural default was *Maxwell* v. *Sumner*, 673 F.2d 1031, (9th Cir.), *cert. denied*, 459 U.S. 976 (1982). Maxwell was denied self-representation at a state trial conducted before *Faretta* v. *California*, 422 U.S. 806 (1975). He appealed on this ground to the California Court of Appeal, which affirmed his conviction. Maxwell then unsuccessfully petitioned for hearing in the California Supreme Court without raising his self-representation claim. Subsequently, Maxwell did raise his self-representation claim by habeas corpus petition to the California Supreme Court, which denied his application with a citation to *In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005 (1965), which holds

that arguments rejected on appeal ordinarily cannot be reviewed on habeas corpus.[1/]

The state claimed that Maxwell had procedurally defaulted at the appellate level "by failing to raise the issue on direct appeal to the California Supreme Court." 673 F.2d at 1033. The Ninth Circuit held that California had no procedural rule requiring a defendant to seek direct review in the California Supreme Court in order to preserve an issue for state habeas review, *id.*, although California's highest court had long held habeas corpus unavailable "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). Without discussing *Dixon*, the Ninth Circuit added, "[m]ore importantly, if such a rule does exist, the California Supreme Court did not invoke it in denying Maxwell's habeas petition; rather, the court indicated, by citing *Waltreus*, that petitioner's claim had been rejected on its merits by the California Court of Appeal." 673 F.2d at 1034-1035. Perhaps aware that this rationale did not meet the state's objection that Maxwell had bypassed the *state supreme court* on direct review, the Ninth Circuit further added: "Moreover, we believe that Maxwell effectively raised his self-representation claim to the California Supreme Court" by petitioning for hearing on *other* grounds. *Id.* at 1034 n.1. Since, by granting a hearing, the California Supreme Court acquired

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1. Until *Maxwell*, *Waltreus* had been widely understood as a procedural ground for denial, within the meaning of *Harris* v. *Superior Court*. California Continuing Education of the Bar, *supra*, at 141.

jurisdiction not merely over the questions presented in the hearing petition, but over the entire case, a petition which raised no federal questions "fairly presented" all federal questions resolved by the intermediate state appellate court, according to the Ninth Circuit.[2/] *Id.*

In effect, *Maxwell* v. *Sumner* held that no state procedural rule supported a default, but that if there were such a rule, the defendant had complied with it and, if he had not complied, the intermediate state appellate court had waived the default on direct review. *Maxwell* thus furnished no precedent for transforming our state supreme court's unexplained denial of a habeas petition into a waiver of any procedural default. Nor may the state be said to have acquiesced in the federal ruling, certiorari having been sought.

Lewis v. *Borg*, 879 F.2d 697 (9th Cir. 1989), not cited by respondent, appears to be the only Ninth Circuit decision holding that the California Supreme Court's silent denial of a habeas corpus petition waived a state court procedural default. Lewis failed to raise his claim of prosecutorial misconduct on direct appeal to the California Court of Appeal. Thereafter, he did present this claim to the California Supreme Court by a petition for writ of

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2. The Ninth Circuit recently repudiated this portion of *Maxwell* in light of a new California Supreme Court rule providing that "'[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court.'" *McGuire* v. *Estelle*, 902 F.2d 749, 753 n.1 (9th Cir. 1990), *pet. for cert. pndg.*, 59 U.S.L.W. 3503 (1990).

habeas corpus, which was denied without citation of authority or other explanation.

On federal habeas corpus, the district court found that the petitioner's failure to challenge the prosecutor's actions on direct appeal was a procedural default barring federal review on the merits. The Ninth Circuit reversed:

> "We have held that such a summary denial of a habeas corpus petition by the California Supreme Court constitutes a decision on the merits, *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974), *cert. denied*, 420 U.S. 973, . . .(1975), and as such, satisfies the requirement that a habeas petitioner exhaust all state remedies before seeking federal habeas relief. *Id.* at 1127-28. Therefore, Lewis did exhaust his state remedies and the district court erred in finding procedural default." 879 F.2d at 698 (footnote deleted).

Regrettably, the Ninth Circuit's misapplication of its "postcard denial" exhaustion rule to forfeit a state procedural default was not resisted by the state in *Lewis* v. *Borg*. *Id.* at 698 n.1. However, California's alleged twenty-one-year history of acquiescence, (Resp. Br. 5-6), consists of this single case.[3/] Within months, California denounced *Lewis* v. *Borg* in this Court as "a blueprint for

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3. Of course, in a particular case, the state's interest may be best served by waiving a procedural default. The Ninth Circuit has observed that "[t]hese questions, when raised in the district court, are almost always more complicated and time consuming than are the merits of the petitioner's federal claim." *Batchelor* v. *Cupp*, *supra*, 693 F.2d at 864.

circumventing [the] state's direct appeal procedure on federal questions" and as promising forgiveness of a state prisoner's "procedural default at trial . . . as well." *Williams* v. *McCarthy*, No. 89-6043, Response in Opposition, at 24.

In the present case, the state's petition for rehearing not only challenged the Ninth Circuit's application of *Harris* v. *Reed*, *supra*,[4/] but sought en banc reconsideration of *Lewis* v. *Borg* and *Harris* v. *Superior Court*. We explained that, to the state, application of the "postcard denial" presumption is as intolerable in the procedural default context as it is acceptable in the exhaustion of remedies context. (Rehrg. Pet. at 4.) We explained, too, that the rulings in this case and in *Lewis* v. *Borg* invite defendants to withhold their federal claims from our state trial and appellate courts, thereby undermining the integrity of state procedure and the finality of state judgments, and effectively transforming a federal habeas court into a federal appeals court with jurisdiction to review state criminal convictions. (Rehrg. Pet. at 9-12.) We emphasized that the Ninth Circuit's rulings had required the California Supreme Court to undertake an unmanageable increase in its workload or, as to federal claims, sacrifice state procedural rules. *Id.* at 12. Finally, we stressed that comity is not advanced by a federal judicial presumption that requires Californians to presume,

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4. This was the first reference by either party to this Court's very recent opinion in *Harris* v. *Reed*. Nevertheless, the Ninth Circuit found this case "appropriate for submission without oral argument. . . ." *Nunnemaker* v. *Ylst*, *supra*, 904 F.2d at 473.

inter alia, that the California Supreme Court regularly violates a state constitutional command that its decisions "shall be in writing with reasons stated," Cal. Const., art. VI, § 14; *Myers* v. *Ylst*, *supra*, 897 F.2d at 426-427 (Kozinski, J., diss.), and occasionally violates our state constitutional separation of powers provision, Cal. Const., art. III, by impliedly refusing to enforce procedural and evidentiary rules enacted by our Legislature. See, *E.g.*, Calif. Evid. Code, §§ 353 and 354; *In re Lance W.*, 37 Cal.3d 873, 891, 694 P.2d 744 (1985); *People* v. *Johnson*, 68 Cal.2d 646, 657, 441 P.2d 111 (1968).

The Ninth Circuit merely presumes that an unexplained denial by the California Supreme Court is on the merits of a habeas petition. *Turner* v. *Compoy*, *supra*, 827 F.2d at 529. Respondent insists that this presumption is empirically valid. Of the 898 habeas corpus petitions the California Supreme Court denied in 1989, respondent notes, "550 were denied without explanation. The rest were denied with citations to one or more cases signalling procedural defect." (Resp. Br. at 8.) From these data, respondent infers that "approximately 39% of the time the Court determined that it was appropriate to deny relief for reasons of procedural default," *id.*, but that far more often our highest state court "wished to afford its citizens full review of federal constitutional claims in federal court, . . . by issuing an unadorned denial." (Resp. Br. at 6.)

Respondent's argument fails to distinguish a "procedural defect" in the habeas petition itself from a "procedural default" in the earlier trial or appeal. The California Supreme Court observes this distinction, however. A review of our state high court's 1989 habeas

corpus denial orders[5] discloses that of the 348 denials accompanied by case citations, 155 denials cited only *In re Swain*, 34 Cal.2d 300, 209 P.2d 793 (1949). *Swain* was cited with at least one other decision in another 112 denial orders. Whatever *Swain* may mean to the Ninth Circuit, compare *Harris* v. *Superior Court*, *supra*, 500 F.2d at 1128, with *Kim* v. *Villalobos*, *supra*, 799 F.2d at 1319, it is clear what *Swain* means to the California Supreme Court:

> "[O]ur determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which the petitioner has attempted to raise [citations]. We are entitled to and do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts." *In re Swain*, 34 Cal.2d at 303-304, 209 P.2d 793.

A citation to *Swain* reflects neither a ruling on the merits nor a claim of procedural default; instead, "[t]his procedural requirement . . . simply demands of [petitioner] a measure of frankness in disclosing his factual situation." *Id.* at 304, 209 P.2d 793. Thus, the final sentence of *Swain* states, "The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified." *Id.*

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5. These orders are included in the California Supreme Court's minutes, regularly published in the California Official Reports Advance Sheets.

In 71 habeas denials in 1989, our state supreme court cited *In re Waltreus*, 62 Cal.2d 218, 397 P.2d 1001 (1965), either exclusively or in conjunction with other authority, including *Swain*. Our state court's internal page cites to *Waltreus* demonstrate that it is invoking the principle that "habeas corpus ordinarily cannot serve as a second appeal" for "arguments that were rejected on [the first] appeal. . . ." *Id.* at 225, 397 P.2d 1001. In the same year, 60 high court habeas denials cited *In re Miller*, 17 Cal.2d 734, 112 P.2d 513 (1941), alone or with other cited authorities. *Miller* holds that the court will not entertain successive petitions alleging the same claims absent intervening change in the facts or applicable law. *Id.* at 735, 112 P. 2d 513. *Waltreus* and *Miller* cannot be said to bar consideration of the merits of the underlying claims, since these decisions foreclose only claims that have been heard and rejected.

In California, habeas corpus may be used to challenge conditions of confinement. In denying 32 habeas petitions in 1989, the California Supreme Court cited *In re Dexter*, 25 Cal.3d 921, 603 P.2d 35 (1979). *Dexter* is not a procedural default case, but holds that "[a]s a general rule, a litigant will not be afforded judicial relief unless he has exhausted available administrative remedies." *Id.* at 925, 603 P.2d 35. Of course, "the 'requirement of exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing courts' jurisdiction to issue the writ.'" *In re Black*, 66 Cal.2d 881, 887, 428 P.2d 293 (1967); *see e.g., In re Hillery*, 202 Cal.App.2d 293, 294, 20 Cal.Rptr. 759 (1962).

On 25 occasions in 1989, the California Supreme Court denied habeas corpus petitions with citations to *In*

re Lindley, 29 Cal.2d 709, 723, 177 P.2d 918 (1947), which explained:

> "Upon habeas corpus, ordinarily it is not competent to retry issues of fact or the merits of a defense, such as insanity, and the sufficiency of the evidence to warrant conviction of the petitioner is not a proper issue for consideration. [Citations.] Nor is habeas corpus an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial."

Lindley and other decisions confining the scope of state habeas corpus are not forfeiture rules. *Lindley's* prohibition against claims of insufficient evidence, for example, applies equally to petitioners who challenge the sufficiency of the evidence for the first time and to petitioners who have raised the same claim at every prior opportunity. More importantly, cases such as *Lindley*, *Waltreus*, and *In re Lessard*, 62 Cal.2d 497, 399 P.2d 39 (1965) (search and seizure questions not cognizable on state habeas corpus), precluding habeas review of entire categories of claims, are not compatible with the Ninth Circuit's notion that original habeas jurisdiction is mandatory in California courts.

Five decisions, *Swain*, *Waltreus*, *Miller*, *Dexter*, and *Lindley*, alone or in combination, were the *only* cases cited in 296 of 348 California Supreme Court habeas denials accompanied by citations of authority in 1989. In other words, at least 85 percent of such denials were based on decisions which showed clearly that the state supreme court did not invoke a procedural default. The failure of

respondent's premise, that "39% of the time the Court . . . den[ied] relief for reasons of procedural default," is fatal to his conclusion that in the remaining habeas cases the California Supreme Court "wished to afford its citizens full review of federal constitutional claims in federal court, . . . by issuing an unadorned denial." (Resp. Br. at 6, 8.)

The California Supreme Court apparently is aware of *Harris* v. *Reed*. On May 31, 1990, our state high court entered the following order in *In re Theodore Frank on Habeas Corpus*, S013949:

> "None of petitioner's claims has merit or states a prima facie case for relief. Additionally, the claims described in paragraphs X through XVI are barred for procedural default as being untimely (In re Stankewitz (1985) 40 Cal.3d 391, 397 fn. 10, and noncognizable in habeas corpus (In re Terry (1971) 4 Cal.3d 911, 927; In re Dixon (1953) 41 Cal.2d 756, 759.) Mosk, J. and Broussard, J., are of the opinion the petition should be denied solely for failure to state a prima facie case for relief." California Official Reports, Advance Sheets, No. 18, Minutes, p.17 (1990).

The majority's explicit claim of "procedural default" appears to be directed towards the federal courts. However, this order is not proof that the state court "easily can write that 'relief is denied for reasons of procedural default,'" *Harris* v. *Reed*, *supra*, 489 U.S. at 265 n.12, or that the California Supreme Court is often inclined to do so. Rather, the order illustrates several difficulties arising from state habeas petitions: numerous claims; various grounds for rejecting a single claim; various

grounds for rejecting different claims; disagreement among the justices as to the proper grounds for denial. Not apparent from the face of the order, but present in the case, is the matter of successive petitions. See *People* v. *Frank*, 51 Cal.3d 718, 723, 274 Cal.Rptr. 372 (1990).

There is nothing "*pro forma*" about this order or about the deliberative process that produced it. Cf. *Harris* v. *Reed*, *supra*, 489 U.S. at 265 n.12. The California Supreme Court provided a detailed explanation for its action because this is a death penalty case. As a capital case, *Frank* is within that court's exclusive, mandatory appellate jurisdiction. Cal. Const., art. VI, § 11. Our Supreme Court Policies Regarding Cases Arising from Judgments of Death direct appellate counsel to investigate available grounds for habeas corpus relief and to file a habeas petition within 90 days after the filing of the defendant's reply brief on the direct appeal. Our supreme court's policy of consolidating direct appeals and habeas corpus proceedings in capital cases is implemented by compensating counsel only for petitions filed in the California Supreme Court. See California Official Reports Advance Sheets, 48 Cal.3d 1045a-1045b (1989); 51 Cal.3d Rules 8 (1990).

In 1989, the California Supreme Court denied 898 habeas corpus petitions, but filed only 27 opinions in death penalty cases. The differences between these numbers, between the state high court's mandatory and discretionary jurisdiction, and between capital and noncapital cases, explain why the California Supreme Court treats capital habeas petitions differently and why it cannot do otherwise. (See Petr. Br. at 22-23.)

The dissenting opinion in *Harris* v. *Reed* warned that "[b]ecause an ambiguous state-court order will ensure access to a federal habeas forum, prisoners whose claims otherwise would be procedurally barred now have every incentive to burden state courts with a never-ending stream of petitions for post-conviction relief," at least until they are "rewarded with a suitably ambiguous rebuff, perhaps a one-line order . . . stating that relief is 'denied.'" 489 U.S. at 282 (Kennedy, J., diss.); but cf. *id.* at 275 n.1. Dictum in footnote 12 of the majority opinion, *id.* at 265 n.12, relied on by the Ninth Circuit, made this prediction reality. *Nunnemaker* v. *Ylst*, *supra*, 904 F.2d at 476.

Respondent speculates that successive petitions will present no difficulty for the California Supreme Court because petitioners are asked to provide a complete procedural history of their case, including claims previously raised by habeas corpus petitions. (Resp. Br. at 30-31.) Not surprisingly, petitioners often neglect to doom their applications for relief by noting that their claims already have been rejected. Since in noncapital cases the state supreme court acts without the benefit of opposition, the disclosure requirement is virtually unenforceable.

"If this is in fact too burdensome on the state courts," respondent suggests, the state "can pass legislation amending [state] procedure." (Resp. Br. at 31.) Assuming that a statute could effectively remove or regulate original habeas jurisdiction conferred upon the California Supreme Court by our state constitution, Cal. Const., art. VI, § 10, the resulting withdrawal of the state court from post-conviction proceedings would disserve both state prisoners and the federal interest in state court

acceptance of responsibility for safeguarding federal rights. See *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982).

Respondent's assertion that the Ninth Circuit's extension of the holding of *Harris* v. *Reed* imposes no new or undue burden on the California Supreme Court rests on a misunderstanding of the habeas corpus doctrine of both courts. There is no reason to suppose that the California Supreme Court regularly elects to waive state court procedural defaults; there is good reason to suppose that our state court lacks the resources to satisfy the Ninth Circuit's requirement that it act as though its discretionary jurisdiction to determine what cases to accept were mandatory jurisdiction to decide those cases. (Petr. Br. at 22-23.) The decision below forces the state court to choose between preserving the integrity of our procedural rules, disposing of its docket as it deems proper, or relinquishing its original habeas jurisdiction.[6/] Our notion of comity does not embrace a federal decision which, in practice, compels the state court to vindicate its procedural rules by waiving them.

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6. California's constitutional provision conferring original habeas corpus jurisdiction on the state supreme court is not unique. *See, e.g.,* Fla. Const., art. V, § 4; Idaho Const., art. V, § 9; Ill. Const., art. VI, § 4; Texas Const., art. V, § 5.

II.

A SILENT DENIAL OF A HABEAS CORPUS PETITION BY THE CALIFORNIA SUPREME COURT IS NOT A DECISION ON THE MERITS AND DOES NOT SUPERSEDE A WRITTEN OPINION WHICH FINDS A PROCEDURAL BAR.

Respondent next contends that a "silent" denial by the California Supreme Court of habeas corpus relief is a decision on the merits under state law. He argues: (1) "the California Supreme Court must examine the substantive issues and their merits which are presented in original habeas corpus writs before issuing even a minute order pro forma denial" (Resp. Br. at 12); (2) by contrast, a denial of review of a decision of an intermediate court of appeal does not require consideration of the merits of the appellant's claim; and (3) there is a meaningful distinction, for purposes of federal habeas corpus review of state convictions, between a summary denial of a petition which invokes a court's *original* jurisdiction and a silent refusal to exercise *appellate* jurisdiction. For reasons which follow, petitioner submits that respondent's position is untenable.

Petitioner begins by reiterating his essential position, which has two distinct dimensions. First, when a federal habeas court, in the exercise of its power under 28 U.S.C. § 2254, reviews a silent denial of habeas relief by a state court, it must examine that denial in the context of state

law.[7] Second, under California law, a denial by the California Supreme Court of habeas corpus relief is a discretionary rejection of the claim (or claims) but not necessarily a decision on the merits. Respondent earnestly disputes the second branch of this argument but in doing so, he implicitly accepts the first prong.

It seems to have been the theory of the Ninth Circuit that under *Harris* v. *Reed, supra*, 489 U.S. at 265 n. 12, a one-line *pro forma* denial by a state court of habeas corpus is conclusively presumed to be a rejection of the merits of the prisoner's claim unless the state court clearly and expressly relied upon a procedural default. *Nunnemaker* v. *Ylst*, 904 F.2d at 476. As petitioner reads

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7. Respondent asserts that "there has never been any suggestion that a writ of certiorari does not run to the California Supreme Court's minute order denial of an original writ of habeas corpus." (Resp. Br. at 14.) This observation completely misapprehends petitioner's point. Even if this Court should have *jurisdiction* under 28 U.S.C. § 1257 to review an order denying habeas corpus "by the highest court of a State in which a decision could be had," the *content* of the order must be determined by reference to state law. If the habeas denial reflects a discretionary decision not to grant the writ, because, for example, the petitioner did not raise the claim on his appeal ten years earlier, certiorari must be denied by this Court because the merits of the claim would not be before the Court. By parity of reasoning, on a petition for writ of habeas corpus under 28 U.S.C. § 2254, the federal habeas court would have jurisdiction to review the silent denial by the California Supreme Court, but would be required to resort to local law to determine the content of the order and, therefore, the significance of the denial.

the opinion of the Ninth Circuit, state law regarding the significance of a silent denial is irrelevant in the context of disposing of a subsequent petition for writ of federal habeas corpus. According to the Ninth Circuit, the Federal Habeas Corpus Act, as explicated in *Harris* v. *Reed, supra*, requires a federal habeas court to find that an unexplained denial of relief by a state court forgives any procedural defaults regardless of any state rule which may be to the contrary. U.S. Const., art. VI. If respondent agreed with that holding, he would have found it unnecessary to analyze state law. His attempt to establish that California law justifies the decision of the Ninth Circuit is, in effect, a repudiation of the *ratio decidendi* of that court. At the very least, both parties apparently have agreed that the judgment should be reversed to permit the Ninth Circuit to determine the significance under state law of a silent denial of habeas relief.

Turning to that issue, petitioner reiterates his position that a silent denial of habeas relief by the California Supreme Court does not forgive a procedural default which had been expressly invoked against the prisoner by an inferior court. In challenging this proposition, respondent argues that the supreme court must examine the merits of the issues presented in a petition for writ of habeas corpus before denying it. If the court does not cite a case which indicates a procedural basis for the denial, respondent concludes, the denial must have been on the merits. Petitioner readily agrees that the state supreme court carefully examines each petition for writ of habeas corpus, but disputes respondent's conclusion that

the basis for the denial is invariably ascertainable from the four corners of the court's order.

As petitioner explained in Argument I, many of the cases cited by the state supreme court in its orders of denial indicate a procedural defect *in the petition before it*. Thus, the petition may duplicate claims which had been rejected in earlier habeas petitions (*In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 513 (1941]); it may make claims which were raised on direct review (*In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001 [1965]); it may raise a claim with insufficient factual allegations (*In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 [1949]); or it may raise claims which are generally not cognizable on state habeas corpus (*e.g.*, *In re Sterling*, 63 Cal.2d 486, 487, 407 P.2d 5 [1965]; *In re Lindley*, 29 Cal.2d 709, 723, 177 P.2d 918 [1947].) Respondent suggests that an order denying relief which does not cite such a case must reflect a rejection of the merits of the claim. The suggestion presumes that procedural defects which may be found in a habeas petition exhaust the universe of procedural defaults. In fact, as in this case, the default may have occurred at trial. None of the cases upon which respondent relies (Resp. Br. at 22-23) addresses such a procedural default. Even accepting respondent's position that a silent denial could be interpreted as forgiving a pleading defect, it would be impossible to determine whether it also forgave a default occurring at trial.

Furthermore, respondent's argument overlooks the fact that the state supreme court is composed of seven justices, each of whom may have a different reason for denying relief. For example, two may reject the claim on the merits; two may determine that the claim was not

stated with sufficient particularity and three may decide that the petitioner should have raised the issue on appeal. This division of reasons may be compounded by a petition which presents multiple claims for relief.

Petitioner cannot stress too strongly that the validation of respondent's view of California habeas corpus practice would undermine the state supreme court's ability to control its docket. Unless the court were willing to grant a blanket waiver of procedural defaults, it would be required to issue orders in each habeas corpus case explaining the basis for the denial of the petition. As a result, the court would soon lose control of its caseload.

Finally, respondent notes that a denial of review by the state supreme court of an intermediate appellate court is not a decision on the merits according to Rule 29 of the California Rules of Court. Because there is no comparable rule expressly permitting the state high court to deny habeas relief as a matter of discretion, it follows that a silent denial must be on the merits. Respondent assumes that the rules of court furnish the exclusive basis for interpreting the significance of silent denials by the state supreme court. Petitioner believes that the opinions of that court provide better illumination.

Thus, the state high court has indicated that the writ may be employed as a substitute for an appeal when the question of law is "'so important as to justify an extraordinary remedy. . . .'" *In re Jackson*, 61 Cal.2d 500, 505, 393 P.2d 420 (1964). In addition, the court will issue an order to show cause to resolve a conflict in cases decided by the intermediate courts of appeal. *In re Joyner*, 48 Cal.3d 487, 491, 769 P.2d 967 (1989). These exceptions are identical to those specified in Rule 29(1), which

defines the discretion of the supreme court in the review of court of appeal decisions. This congruence suggests the conclusion that the state high court views its habeas jurisdiction, like its power on direct review, as a discretionary tool to shape the state's jurisprudence. Certainly its denials are not intended as conclusions on the merits.[8/]

A silent denial of habeas relief by the state supreme court reflects nothing more than a discretionary decision not to disturb a presumptively valid judgment. It does not purport to reflect the reasons why the court has reached that decision. As explained above, each justice of the California Supreme Court may have his or her own reasons. Nor does the failure to give reasons for a denial in any way compromise the existence of habeas corpus as a meaningful remedy in California. State law requires superior courts, in which the prisoner should file his

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8. In addition, respondent has overlooked California Penal Code section 1506, which allows the prisoner to petition for review in the supreme court "in all criminal cases where an application for writ of habeas corpus has been heard and *determined* in a court of appeal. . . ." (Emphasis added.) By contrast, summary denials by the court of appeal are not appealable; the prisoner must petition for habeas corpus to the supreme court. *In re Crow*, 4 Cal.3d 613, 621 n. 8, 483 P.2d 1206 (1971). Thus, the legislature has drawn a distinction between written opinions, which determine the merits of a petition and are appealable, and summary denials, which reflect no decision on the merits and hence are not appealable. The state high court's practice merely reflects this legislatively-endorsed distinction.

petition initially (*In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 [1962]), to provide "a brief recital of the reasons for the denial" in its order. Cal. Rules of Court, rule 260(e). Given the prisoner's entitlement to an explanation from the superior court, the supreme court should not be obliged to reiterate or supplement that explanation.[9/]

In respondent's case, he had more than a brief recital of reasons. He had a full and correct explanation on direct appeal of the basis for the rejection of his claim under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Nevertheless, he contends (Resp. Br., Argu. III) that the denial of habeas relief was not necessarily an approval of the reason given by the court of appeal, which had found a default at trial. He explains that state law provides several exceptions to procedural bars on state habeas corpus (Resp. Br. at 24) and that the failure by the supreme court to cite any cases which announce such a bar suggests the possibility that the denial was on the merits. Specifically, it is possible that the state high court waived the prohibition against relitigating on habeas

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9. Petitioner recognizes that the California Supreme Court denies a significant percentage of habeas corpus petitions with a citation to a case or cases which suggest procedural defect. (Resp. Br. at 8.) The vast majority of these petitions are prepared by prisoners without the aid of counsel. The citations are intended to advise them of the procedural defects which appear on the face of their petitions. The failure to provide free legal advice in other summary denials is *not* intended to waive procedural defaults which may have occurred at trial or on appeal.

waived the prohibition against relitigating on habeas corpus claims which had been raised an appeal (*In re Waltreus, supra*, 62 Cal.2d 218, 397 P.2d 1001) because respondent relied on cases which had not been decided at the time of his appeal.

The fallacy of this theory lies in the misapprehension of the function of the exceptions upon which respondent relies. If in fact the supreme court is relying upon an exception to a procedural bar, it will *issue* an order to show cause and then proceed to decide the merits of the claim in a *written opinion*. *E.g.*, *In re Coughlin*, 16 Cal.3d 52, 545 P.2d 249 (1976); *In re Bevill*, 68 Cal.2d 854, 442 P.2d 679 (1968). Respondent cites no authority which declares that silent denial may be construed as a waiver of a default which previously had been invoked against the prisoner. Petitioner reiterates the overarching principle of California law, based upon reason and justice, which explains the rejection by the California courts of respondent's *Miranda* claim: a written opinion providing reasons for the denial of a constitutional claim is neither altered nor supplanted by subsequent summary denials of habeas relief by an appellate court which has exercised its discretion not to issue an order to show cause. In this case, the state court of appeal expressly based its rejection of respondent's *Miranda* claim upon his failure to object at trial. His subsequent efforts to litigate the merits of that claim were met with a uniform rejection in the form of one-line denials by the state court of appeal and supreme court. If respondent and the Ninth Circuit want to know the reason for that rejection, they have only to inspect the opinion written by the state court of appeal almost 15 years ago.

III.

HARRIS V. *REED* DID NOT DECLARE THAT A SILENT DENIAL OF STATE HABEAS CORPUS RELIEF WAS CONCLUSIVELY PRESUMED TO BE ON THE MERITS.

Finally, respondent asserts that the "plain statement" rule of *Harris* v. *Reed, supra*, plainly applies to minute order denials of state habeas corpus relief (489 U.S. at 265 n.12), and that any rule to the contrary would have the undesirable consequence of requiring federal courts to examine state law and the prisoner's state court records to determine whether state courts in fact applied an available procedural bar. Petitioner responds to these concerns in turn.

This Court declared in *Harris* that "a state court that wishes to rely on a procedural bar rule in one-line *pro forma* denial easily can write that 'relief is denied for reasons of procedural default.'" *Id.* at 265 n. 12. This footnote dictum necessarily presupposes that a one-line denial is a resolution of the merits under state law. Nothing in *Harris* suggests that this Court intended to create a conclusive presumption that a silent denial was a decision on the merits in derogation of state law which may hold to the contrary. Consequently, the *Harris* dictum requires initial evaluation of state law to determine whether a silent denial is a resolution of the merits of the claim. If so, a "plain statement" rule is necessary to determine state reliance upon a procedural bar. But

where, as here, habeas relief is discretionary under state law, and an earlier written opinion has resolved the constitutional claim and identified the basis therefor, the "plain statement" rule is clearly inapplicable.

Respondent also contends that petitioner's position, if accepted, would require federal habeas courts "to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris* v. *Reed, supra*, at 265. This assertion does not withstand scrutiny, for inquiries into state law are inevitable on federal habeas review.

Thus, the federal habeas court must determine whether the prisoner has exhausted state remedies or whether such a remedy is still available, a question of state law. *Castille* v. *Peoples*, 489 U.S. 346 (1989). Exhaustion of state remedies will be found if there is a state procedural bar to the litigation of the claim, another question of state law. *Teague* v. *Lane*, 489 U.S. 288, 297 (1989). If a state procedural bar exists, the federal habeas court must determine whether state courts routinely apply it, an inquiry which necessarily entails on careful analysis of state law. *Dugger* v. *Adams*, 489 U.S. 401, 410-411 n. 6 (1989). In addition, the federal habeas court must decide whether the procedural rule furthers legitimate state interests. *James* v. *Kentucky*, 466 U.S. 341, 344-349 (1984). In light of this considerable body of state law which federal courts are expected to know and apply, an evaluation of a silent denial by the state supreme court of habeas relief in the context of the prior procedural history -- assumed by respondent to be routinely

available[10/] (Resp. Br. at 30 n.16) -- should not be unduly burdensome. See *Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

In stark contrast to this insignificant incremental burden are the consequences of respondent's position, if adopted. Should this Court accept the argument that silent denials are conclusively presumed to be on the merits, the California Supreme Court no longer would have control of its own docket. The court would be required to prepare written orders, in which four or more justices concurred, in almost one thousand additional cases each year. The only alternative would be acquiescence in a conclusive presumption which compromises state law. This Court surely did not intend to undermine the vital interests of federalism and comity by requiring such a drastic alteration of state habeas corpus review. Respondent's view of *Harris* and its reach must be rejected.

CONCLUSION

It is too much to ask federal courts to read the minds of state courts, which need only speak clearly. It is not to much to ask that federal courts read state laws before declaring that state courts have silently refused to enforce

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10. In fact, many petitions filed by prisoners *in forma pauperis* will make misrepresentations about the procedural history of their trial, conviction, and use of appellate remedies. A summary denial by the state supreme court of habeas relief cannot be interpreted as a waiver of a procedural bar of which the state court might not have been aware.

their procedural rules. That difference between *Harris* v. *Reed* and this case prompted California to urge application of the "plain statement" rule, as amicus curiae in *Harris*. California has not changed its view; by overextending *Harris*, the Ninth Circuit has changed the stakes. *Harris* required only plain language; the decision below requires that the California Supreme Court sacrifice control of its docket or the integrity of procedural rules governing state trials and appeals. Beyond affronting the principle of comity, such results are unnecessary since assessment of state laws by federal courts is an integral part of the procedural default rule, and constitutes a burden federal courts have proved able to bear. *Brown* v. *Allen*, 344 U.S. 443, 458 (1953).

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